

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAY E. HOFFMAN, et al.,

CASE NO. C17-1062JLR

Plaintiffs,

ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
JUDICIAL NOTICE

PENNYMAC HOLDINGS, LLC,

Defendant.

I. INTRODUCTION

Before the court are: (1) Plaintiffs Ray E. Hoffman and Patricia L. Hoffman’s (collectively, “the Hoffmans”) motion for summary judgment (MSJ (Dkt. # 26)), and (2) Defendant PennyMac Holdings, LLC’s (“PennyMac”) motion for the court to take judicial notice of certain documents filed in response to the Hoffmans’ motion (MJN (Dkt. # 34)). PennyMac opposes the Hoffmans’ motion for summary judgment. (See Resp. (Dkt. # 33).) The Hoffmans did not file a reply in support of their motion and did not file an opposition to PennyMac’s motion for judicial notice. (See generally Dkt.)

1 The court has reviewed the motions, the parties' submissions related to the motions, the
2 relevant portions of the record, and the applicable law. Being fully advised,¹ the court
3 DENIES the Hoffmans' motion for summary judgment and GRANTS PennyMac's
4 motion for the court to take judicial notice of certain documents.

5 **II. BACKGROUND**

6 On or about April 7, 2006, the Hoffmans executed a promissory note ("the Note")
7 for a \$568,000.00 loan from lender Homecomings Financial Network, Inc.
8 ("Homecomings").² (Morton Decl. (Dkt. # 35) ¶ 4, Ex. A (attaching a copy of the Note).)
9 A senior Deed of Trust, dated April 7, 2006, secures the Note and is recorded against the
10 real property located at 5612 Sandpiper Lane, Blaine, Washington 98230 ("the
11 Property"). (*Id.* ¶ 5, Ex. B.) The Hoffmans also executed a second note for a subordinate
12 junior loan in the amount of \$100,000.00, the repayment of which is secured by a second
13 position Deed of Trust recorded against the Property. (*Id.* ¶ 6, Ex. C.)

14 On or about September 22, 2016, the Note was assigned to PennyMac, and
15 PennyMac is the current holder of the Note and the beneficiary under the senior Deed of
16 Trust. (*Id.* ¶ 9, Ex. F.) Nonparty PennyMac Loan Services, LLC ("PMLS") presently
17 services the Note. (*Id.* ¶¶ 1, 8, Ex. E.) Prior servicers of the Note include Bank of

18 _____
19 ¹ No party requested oral argument on either motion, and the court determines that oral
20 argument would not be of assistance in deciding the motions. *See* Local Rules W.D. Wash. LCR
21 7(b)(4).

22 ² The Hoffmans originally named Homecomings as a defendant in this suit. (*See* Compl.
23 (Dkt. # 1-1) ¶ 1.3.) However, the court dismissed Homecomings, whose successor in interest is
24 E*Trade, in a stipulated order dated October 17, 2018. (*See* Stip. Order (Dkt. # 25) at 1
25 (dismissing E*Trade, as successor in interest to Homecomings, with prejudice).) Accordingly,
the only defendant remaining in this action is PennyMac.

1 America, N.A. (“BANA”) and BAC Home Loan Servicing, LLC (“BAC”). (*Id.* ¶¶ 3, 7,
2 Ex. D.)

3 In September 2009, Plaintiffs filed a Chapter 7 bankruptcy petition in the United
4 States Bankruptcy Court for the Western District of Washington. (*See* MJN, Ex. A; *see*
5 *also* Compl. ¶ 3.7.) The bankruptcy court entered a Chapter 7 discharge on January 6,
6 2010. (*See* MJN, Ex. B; Compl. ¶ 3.7.) The Hoffmans admit that the last payment they
7 made on the Note was in May 2009. (MSJ at 3 (“The [Hoffmans] made monthly
8 payments on the \$568,000[.00] loan through May, 2009. [They] did not make the June 1,
9 2009[,] payment or any payment since then.”).)

10 On June 2, 2017, the Hoffmans filed this suit in Superior Court for the State of
11 Washington in Whatcom County. (*See* Compl.) In their complaint, the Hoffmans allege
12 a single claim for quiet title on the Property. (*See id.*) The Hoffmans allege that
13 PennyMac’s ability to foreclose on the Deed of Trust is barred by the six-year statute of
14 limitations under Washington law. (*See id.*) Specifically, they allege that their January 6,
15 2010, Chapter 7 discharge in bankruptcy commenced the running of the statute of
16 limitations to foreclose on the Property, and PennyMac subsequently failed to foreclose
17 within the six-year statutory period. (*See id.* ¶¶ 3.7-3.16.)

18 On October 24, 2018, the Hoffmans filed the present motion for summary
19 judgment. (*See* MSJ.) The Hoffmans assert three arguments. First, they argue that the
20 Deed of Trust is unenforceable because the “Note has been [s]plit from the Deed of
21 Trust” and PennyMac lacks the authority to foreclose. (*Id.* at 16-17.) Second, they argue
22 that the six-year statute of limitations has run on the Deed of Trust rendering it

1 unenforceable. (*Id.* at 17-18.) Finally, they argue that the doctrine of laches bars
2 PennyMac's enforcement of the Deed of Trust because PennyMac unreasonably delayed
3 foreclosure proceedings in a manner that unduly prejudiced the Hoffmans. (*Id.* at 18-20.)

4 PennyMac responds that the Hoffmans failed to file any competent evidence in
5 support of their motion and that the court should deny the motion on this ground alone.
6 (Resp. at 11-13.) PennyMac also argues that genuine disputes of material fact exist as to
7 whether the statute of limitations on foreclosure was (1) tolled by the commencement of
8 two non-judicial foreclosures on the Property (*id.* at 13-15), and (2) equitably tolled by
9 the Hoffmans' repeated requests between 2011 and 2017 for PennyMac to accept various
10 alternatives to foreclosure, including short sales of the Property and a deed in lieu of
11 foreclosure (*id.* at 15-18). PennyMac also argues that it has the authority to foreclose on
12 the Deed of Trust because it is the holder of the Note, which is endorsed in blank. (*Id.* at
13 21-23.) Finally, PennyMac maintains that the doctrine of laches is inapplicable in the
14 present circumstances. (*Id.* at 23.)

15 The court now considers the parties' motions.

16 **III. ANALYSIS**

17 **A. Summary Judgment Standard**

18 Summary judgment is appropriate if the evidence shows "that there is no genuine
19 dispute as to any material fact and the movant is entitled to judgment as a matter of law."
20 Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
21 *Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is "material" if it might affect the
22 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A

1 factual dispute is “‘genuine’ only if there is sufficient evidence for a reasonable fact
2 finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986,
3 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

4 **B. Plaintiffs’ Evidence in Support of Summary Judgment**

5 PennyMac objects to the evidence the Hoffmans present in support of their motion
6 for summary judgment. First, PennyMac objects that the declarations of Mr. Hoffman
7 and Chuck Occhiogrosso are not admissible because neither of these witnesses attest to
8 their statements in the manner required under 28 U.S.C. § 1746. (Resp. at 12-13; *see also*
9 Occhiogrosso Decl. (Dkt. # 27); Occhiogrosso Praecipe (Dkt. # 31) (attaching signature);
10 Am. Hoffman Decl. (Dkt. # 29); Am. Hoffman Praecipe (Dkt. # 32) (attaching
11 signature).) Second, PennyMac objects to the unauthenticated documents that the
12 Hoffmans attach to their motion. (Resp. at 11; *see also* MSJ, Exs. 1-15 (Dkt.
13 ## 26-1 - 26-15).) The court now considers both objections.

14 1. The Declarations

15 PennyMac objects to the court’s consideration of either Mr. Hoffman’s or Mr.
16 Occhiogorsso’s declaration. (*Id.* at 12-13.) “In ruling on a motion for summary
17 judgment, a court may substitute an unsworn declaration for a sworn affidavit if the
18 declaration complies with 28 U.S.C. § 1746. But such documents must be based on
19 ‘personal knowledge’ and must be ‘subscribed by’ the declarant.” *United States v.*
20 *Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (quoting Fed. R. Civ. P. 56(e) and 28 U.S.C.
21 § 1746). To satisfy 28 U.S.C. § 1746, a declaration must include a statement “in
22 substantially the following form: . . . ‘I declare (or certify, verify, or state) under penalty

1 of perjury that the foregoing is true and correct.”” *See* 28 U.S.C. § 1746(2). A
2 declaration need only “substantially comply with the statute’s suggested language” for
3 the court to consider the declaration as evidence. *Commodity Futures Trading Comm’n*
4 *v. Topworth Int’l., Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999) (internal quotation marks
5 omitted). Substantial compliance requires the declarant to make two assertions in the
6 declaration: (1) that the statements in the declaration are made “under penalty of
7 perjury,” and (2) “that the contents [a]re true and correct.” *Schroeder v. McDonald*, 55
8 F.3d 454, 460 n.10 (9th Cir. 1995); *see also Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d
9 1300, 1306 (5th Cir. 1988) (“[Section 1746] . . . permits unsworn declarations to
10 substitute for an affiant’s oath if the statement contained therein is made ‘under penalty
11 of perjury’ and verified as ‘true and correct.’ [The declarant] never declared her
12 statement to be true and correct; therefore, her affidavit must be disregarded as summary
13 judgment proof.”) (footnote omitted).

14 Mr. Hoffman’s amended declaration states: “I have read our motion summary for
15 judgment and declare under penalty of perjury that all the factual statements contained
16 therein are true and correct to the best of my knowledge, information and belief and I
17 adopt those statements in addition to my statements herein as my testimony.” (Am.
18 Hoffman Decl. at 7.) Similarly, Mr. Occhiogrosso’s declaration states: “I declare under
19 penalty of perjury that all the factual statements contained in the attached emails and all
20 the factual statements contained herein are true and correct to the best of my knowledge,
21 information and belief and I adopt them as my testimony.” (Occhiogrosso Decl. at 6.)
22 Both of these declarants fail to attest that the contents of their respective declarations are

1 true and correct under penalty of perjury. Instead, they declare that the contents of their
2 declarations are “true and correct to the best of [their] knowledge, information and
3 belief.” (Am. Hoffman Decl. at 7; Occhiogrosso Decl. at 6.)

4 Numerous courts have found the type of language used in Mr. Hoffman’s and Mr.
5 Occhiogrosso’s declarations to be not in substantial compliance with 28 U.S.C. § 1746.

6 *See, e.g., Columbia Pictures Indus., Inc. v. Prof'l Real Estate Inv'rs, Inc.*, 944 F.2d 1525,
7 1529 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993) (“Because [the] declaration is not based
8 on personal knowledge, but on information and belief, [the declarant’s] statement does
9 not raise a triable issue of fact”) (citing *Taylor v. List*, 880 F.2d 1040, 1045 n.3 (9th
10 Cir. 1989)); *United States v. James*, 61 F.3d 913 (9th Cir. 1995) (concluding that a
11 declaration of counsel “who testified on information and belief” “was of no evidentiary
12 value”); *Satterwhite v. Dy*, No. C11-528 RAJ, 2012 WL 748287, at *2 (W.D. Wash. Mar.
13 5, 2012) (striking declarations because “they do not attest that their statements are true
14 and correct as required by 28 U.S.C. § 1746,” but rather attest “that the above is accurate
15 to the best of [the declarant’s] knowledge and belief”); *Cobell v. Norton*, 310 F. Supp. 2d
16 77, 85 (D.D.C. 2004) (concluding that declaration “based on nothing more than
17 “knowledge, information, and belief” did not satisfy the requirements of 28 U.S.C.
18 § 1746 and would not, therefore, be considered); *Wash. Cent. R. Co. v. Nat'l Mediation
19 Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993) (concluding that statements in
20 declaration based on “information and belief” are insufficient to support summary
21 judgment). Based on this authority, the court concludes that neither Mr. Hoffman’s nor
22 Mr. Occhiogrosso’s declarations meet the requirements of 28 U.S.C. § 1746.

1 Accordingly, the court will not consider either declaration in support of the Hoffman's
2 motion for summary judgment.³

3 2. The Unauthenticated Documents Appended to the Hoffmans' Motion

4 PennyMac also objects to the court's consideration of the various documents that
5 the Hoffmans append to their memorandum.⁴ (See Resp. at 11; *see also* MSJ, Exs. 1-15.)
6 Unauthenticated documents lacking a proper foundation cannot be considered on a
7 motion for summary judgment. *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925
8 (9th Cir. 1987). To be considered by the court, "documents must be authenticated by and
9 attached to an affidavit that meets the requirements of [Rule] 56(e) and the affiant must
10 be a person through whom the exhibits could be admitted into evidence." *Id.*; *see also*
11 10A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure § 2722 at 58-60 (2d
12 ed. 1983). The Hoffmans provide no evidentiary foundation or authentication for the
13 documents they append to their motion; neither do they request that the court take judicial

14

15 ³ The court assumes that Mr. Hoffman intended his amended declaration to replace the
16 initial declaration that he filed. (*Compare* Hoffman Decl. (Dkt. # 28), *with* Am. Hoffman Decl.)
17 To the extent, however, that Mr. Hoffman intended the court to consider both his initial and his
18 amended declaration in support of the summary judgment motion, the court declines to do so.
19 Mr. Hoffman's initial declaration suffers from the same 28 U.S.C. § 1746 defect as his amended
20 declaration. (See Hoffman Decl. at 5 (stating, "I have read our motion for summary judgment
21 and declare under penalty of perjury that all of the factual statements contained therein are true
22 and correct to be best of my knowledge, information and belief and I adopt those statement in
addition to my statements herein as my testimony").)

23

24 ⁴ In his amended declaration, Mr. Hoffman states that he has "read [the] motion for
25 summary judgment," and he "adopt[s] those statements" in the motion for summary judgment in
26 addition to the statements in his declaration as his testimony. (Am. Hoffman Decl. at 7.) To the
27 extent that this is an attempt to authenticate the documents that the Hoffmans append to their
28 motion for summary judgement, the court rejects it. The court has already concluded that Mr.
Hoffman's amended declaration is not admissible for purposes of supporting the Hoffmans'
motion because it does not substantially comply with 28 U.S.C. § 1746. *See supra* § III.B.1.

1 notice of any of the documents.⁵ (See generally Dkt.) Accordingly, the court declines to
2 consider the appended documents for purposes of summary judgment.

3 In sum, neither the declarations the Hoffmans submit nor the documents they
4 append to their motion are admissible for purposes of ruling on their motion for summary
5 judgment. Thus, the Hoffmans' motion is entirely lacking in any evidentiary support.
6 On this ground alone, the court denies their motion.

7 **C. PennyMac's Evidence in Opposition to the Hoffmans' Motion**

8 Even if the declarations the Hoffmans submit and the documents they append to
9 their motion were admissible, the court would still deny the Hoffmans' motion for
10 summary judgment because PennyMac submits evidence that raises triable issues of fact
11 concerning the claims raised in the Hoffmans' motion.

12 1. PennyMac's Motion for Judicial Notice

13 Preliminarily, in support of its response, PennyMac asks the court to take judicial
14 notice of: (1) the Chapter 7 voluntary bankruptcy petition that the Hoffmans filed in the
15 Western District of Washington, and (2) the bankruptcy court's order discharging the
16 Hoffmans in their bankruptcy action on January 6, 2010. (See MJN at 1, Exs. A-B); Fed.
17 R. Evid. 201. A trial court may take judicial notice of other federal court records and
18

19 ⁵ Although the court may have discretion to *sua sponte* take judicial notice of some of the
20 documents appended to the Hoffmans' motion, *see* Fed. R. Evid. 201(c)(1), the court declines to
21 do so here. The Hoffmans append over 85 pages of exhibits to their motion. (See MSJ, Exs. 1-
22 15.) The court is not responsible for sifting through those exhibits to determine which ones, if
any, may be subject to judicial notice. *Guatay Christian Fellowship v. Cty. of San Diego*, 670
F.3d 957, 987 (9th Cir. 2011) ("As the Seventh Circuit . . . stated aptly: 'judges are not like pigs,
hunting for truffles buried in briefs.'") (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir.
1994) and *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam)).

1 proceedings. *See Reyn's Pasta Bella, LLC. V. Visa USA, Inc.*, 442. F.3d 741, 746 n.6
2 (9th Cir. 2006) (taking judicial notice of court filings from other federal court
3 proceedings as matters of public record); *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th
4 Cir. 2007) (stating that a federal court may take judicial notice of proceedings both within
5 and outside of the federal judicial system); *see, e.g.*, 395 *Lampe, LLC v. Kawish, LLC*,
6 No. C12-1503RAJ, 2013 WL 12073478, at *7 (W.D. Wash. Feb. 13, 2013) (taking
7 judicial notice of bankruptcy proceeding records). The Hoffmans have not denied the
8 accuracy of the records appended to PennyMac's request for judicial notice. (*See*
9 *generally* Dkt.) Accordingly, the court grants PennyMac's request and takes judicial
10 notice of these documents.

11 2. Tolling of the Limitations Period for Foreclosure

12 The Hoffmans assert that the statute of limitations for foreclosing on the Property
13 commenced running on January 6, 2010—the day the bankruptcy court issued an order
14 discharging their Chapter 7 bankruptcy. (*See* Compl. ¶¶ 3.11-3.15; MSJ at 17-18.)
15 PennyMac responds that a genuine dispute of material fact exists regarding whether the
16 statute of limitations on the foreclosure of the Property has expired. (Resp. at 15-18.)
17 PennyMac submits evidence that it commenced two non-judicial foreclosure proceedings
18 on the Property by issuing two Notices of Default to the Hoffmans, via certified mail, in
19 2013 and 2015, respectively. (*See* Morton Decl. ¶¶ 56-57, Exs. Y-Z.) PennyMac argues
20 that its initiation of foreclosure proceedings through these Notices of Default tolled the
21 statute of limitations for a certain period of time, thus precluding summary judgment in
22 favor of the Hoffmans on this issue. (Resp. at 13-15.)

1 Washington courts have long recognized that the initiation of non-judicial
2 foreclosure proceedings tolls the statute of limitations on the foreclosure of the subject
3 property. *See Edmundson v. Bank of Am.*, 378 P.3d 272, 277 (Wash. Ct. App. 2016)
4 (tolling of the statute of limitations on foreclosure occurs when a lender advises the
5 borrower of its intent to “resort to the remedies of the Deeds of Trust Act” by sending a
6 written notice of default via certified mail to the borrower); *see also Bingham v. Lechner*,
7 45 P.3d 562, 568 (Wash. Ct. App. 2002) (stating that a party’s “filing of [non-judicial]
8 foreclosure proceedings . . . tolled the statute of limitations”). Indeed, “the statutory
9 limitation period applicable to enforcing payment of a loan is tolled during the duration
10 of a foreclosure proceeding up to 120 days after the original sale date.” *Erickson v. Am’s*
11 *Wholesale Lender*, No. 77742-4-I, 2018 WL 1792382, at *4 (Wash. Ct. App. Apr. 16,
12 2018) (citing *Bingham*, 45 P.3d at 566 and *Albice v. Premier Mortg. Servs. of Wash., Inc.*,
13 239 P.3d 1148, 1156 (Wash. Ct. App. 2010)). Washington courts similarly recognize that
14 multiple incomplete, non-judicial foreclosure proceedings may be counted together to toll
15 the limitations period. *See Erickson*, 2018 WL 1792382, at *4 (combining four notices of
16 trustee’s sales to toll the statutory period for a total of over six years); *Fujita v. Quality*
17 *Loan Serv. Corp. of Wash.*, No. C16-925-TSZ, 2016 WL 4430464, at *2 (W.D. Wash.
18 Aug. 22, 2016) (“Although the entire debt became due on July 16, 2009, the statute of
19 limitations on [the bank’s] ability to foreclose was tolled during the pendency of two
20 Notices of Trustee Sale which were ultimately discontinued.”) (citing *Bingham*, 45 P.3d
21 at 566-68).
22 //

1 Based on the foregoing legal authority, and PennyMac's evidence that it initiated
2 two non-judicial foreclosure actions against the Property, the court concludes that
3 PennyMac has raised a genuine triable factual issue concerning whether the statute of
4 limitations for foreclosing on the Property expired prior to the Hoffmans' filing of this
5 suit. Accordingly, the court denies the Hoffmans' motion for summary judgment based
6 on the expiration of the statute of limitations.⁶

7 3. PennyMac's Authority to Foreclose

8 In their motion for summary judgment, the Hoffmans argue that PennyMac lacks
9 the ability to foreclose on the Property because PennyMac cannot establish that it is the
10 holder of the Note with the authority to foreclose on the Deed of Trust and that the Note
11 has been split from the Deed of Trust. (*See* MSJ at 12-17.) However, PennyMac submits
12 evidence that the Note is endorsed in blank and that PennyMac is the current holder of
13 the Note and beneficiary of the Deed of Trust. (*See* Morton Decl. ¶¶ 4, 9, Exs. A, F.)
14 Under Washington law, an instrument endorsed in blank becomes payable to the bearer
15 and may be negotiated. RCW 62A.3-205(b). The holder of such a negotiable instrument
16 is the person or entity in possession and that person or entity is entitled to enforce it.

17 *Zalac v. CTX Mortg. Corp.*, No. C12-01474 MJP, 2013 WL 1990728, at *3 (W.D. Wash.
18 May 13, 2013), *aff'd*, 628 F. App'x 522 (9th Cir. 2016) (citing RCW 62A.3-301).

19
20

⁶ PennyMac also argues that the statute of limitations was equitably tolled by the
21 Hoffmans' conduct in repeatedly submitting requests or applications for foreclosure alternatives
22 to their Note servicers from 2011 through 2017. (Resp. at 15-18.) Because the court has ruled
that PennyMac raised a triable issue of fact concerning the tolling of limitations period through
the initiation of non-judicial foreclosure proceedings, *see supra* § III.C.2., the court need not
decide this issue.

1 Further, when the Note was transferred to PennyMac, the Hoffman's Deed of
2 Trust was transferred with the Note by operation of law. Under Washington law, a deed
3 of trust follows the transfer of debt. *See e.g., Am. Sav. Bank & Trust Co. v. Helgesen*,
4 116 P. 837, 840 (Wash. 1911), *on reh'g*, 122 P. 26 (Wash. 1912) ("There is no doubt that
5 a mortgage, or any other security given for the payment of a bill or note, passes by a
6 transfer of the bill or note to the transferee."); *Bain v. Metro. Mortg. Group, Inc.*, 285
7 P.3d 34, 44 (Wash. 2012) ("Washington's deed of trust act contemplates the security
8 instrument will follow the note, not the other way around.") Because PennyMac presents
9 evidence that it is the holder of the Hoffmans' Note, PennyMac's evidence also supports
10 the conclusion that it is the holder of the Deed the Trust as a matter of law and, therefore,
11 entitled to enforce it. Thus, "it follows logically that the noteholder is entitled to enforce
12 both the note and the [deed of trust] by operation of law." *Beck v. U.S. Bank Nat'l Ass'n*,
13 No. C17-0882JLR, 2017 WL 6389330, at *4 (W.D. Wash. Dec. 14, 2017) (citing *Bavand*
14 *v. OneWest Bank*, 385 P.3d 233, 248-49 (Wash. Ct. App. 2016), *as modified* (Dec. 15,
15 2016) ("[The bank's] authority to enforce the note and [DOT] arose by operation of law
16 due to the bank's status as holder of the delinquent note.")). Accordingly, PennyMac
17 presents evidence that raises triable issues of fact concerning its ability to enforce both
18 the Note and the Deed of Trust, and the court therefore denies this aspect of the
19 Hoffman's motion.

20 4. Laches

21 The Hoffmans argue that PennyMac's ability to foreclose on the Property is barred
22 by the doctrine of laches. (MSJ at 18-20.) "Laches consists of two elements:

1 (1) inexcusable delay and (2) prejudice to the other party from such delay.”” *Auto.*
2 *United Trades Org. v. State*, 286 P.3d 377, 379 (Wash. 2012) (quoting *State ex rel.*
3 *Citizens Against Tolls v. Murphy*, 88 P.3d 375, 383 (Wash. 2004)). However, “the
4 defense of laches is improperly invoked when both parties are equally at fault in creating
5 the delay.” *Brost v. L.A.N.D., Inc.*, 680 P.2d 453, 457 (Wash. Ct. App. 1984). Here,
6 PennyMac submits evidence that the Hoffmans repeatedly submitted requests and
7 applications for foreclosure alternatives to their Note servicers from 2011 through 2017.
8 (See Morton Decl. ¶¶ 10-55.) Not only did the Hoffmans submit numerous short sale
9 applications to BAC, BANA, and PMLS during that time period, but they also were in
10 active review for a deed in lieu of foreclosure. (See *id.*) Thus, PennyMac submits
11 evidence that it was the Hoffmans’ own actions that induced the delays in the foreclosure
12 process. Based on the foregoing, the court concludes that PennyMac raises a triable issue
13 of fact regarding whether “both parties are equally at fault in creating the delay” of
14 foreclosure on the Property, *see Brost*, 680 P.2d at 457, and therefore the court denies this
15 aspect of the Hoffmans’ motion.

16 **IV. CONCLUSION**

17 Based on the foregoing authorities and analysis, the court DENIES the Hoffmans’
18 //
19 //
20 //
21 //
22 //

1 motion for summary judgment (Dkt. # 26) and GRANTS PennyMac's motion for judicial
2 notice (Dkt. # 34).

3 Dated this 10th day of December, 2018.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



JAMES L. ROBART
United States District Judge